DEPARTMENT OF STATE REVENUE

04-20170085.SLOF

Supplemental Letter of Finding: 04-20170085
Gross Retail and Use Tax
For the Years 2013 and 2014

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Supplemental Letter of Findings.

HOLDING

On rehearing, the Department agreed the Indiana Food Manufacturer provided sufficient information to establish that amounts paid to three different vendors were not subject to Indiana sales or use tax because the amounts represented the price charged Indiana Food Manufacturer for labor or service expenses.

I. Gross Retail and Use Tax - Labor and Service Charges.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2-5-4-1; IC §§ 6-2.5-5 et seq.; IC § 6-8.1-5-1(c); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); 45 IAC 2.2-4-2(a).

Taxpayer argues that the Department's audit erred in assessing tax on the price paid to three vendors because the vendors provided exempt labor or services charges.

STATEMENT OF FACTS

Taxpayer is a researcher, manufacturer, and distributor of food products. Taxpayer operates an Indiana research and development facility, an Indiana warehouse, and an Indiana manufacturing facility.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's sales tax returns and business records. The audit resulted in an assessment of additional sales and use tax based on an agreed-upon "statistical sample" of those purchase records. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted and a Letter of Findings issued on May 2017. The Letter of Findings sustained Taxpayer's protest in part and denied it in part.

Taxpayer requested a rehearing on certain portions of the Letter of Findings which denied Taxpayer's protest. A supplemental hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Supplemental Letter of Findings results.

I. Gross Retail and Use Tax - Labor and Service Charges.

DISCUSSION

The issue is whether Taxpayer has provided sufficient documentation to establish that amounts it paid to Mechanical Company, Promotional Company, and Marketing Company were not subject to Indiana's sales or use tax.

A. Mechanical Company Charges.

Taxpayer paid $34,045 to a vendor here designated as "Mechanical Company." Taxpayer maintains that a portion of the amount was not subject to sales or use tax because Mechanical Company provided only exempt labor or services. According to Taxpayer, Mechanical Company was hired to relocate a conveyor system. The Department's audit report made no reference to this specific transaction except to categorize it as subject to tax.

The May 2017 Letter of Findings denied Taxpayer's protest on the ground that "Taxpayer failed to provide any

independent, third-party verification of [Taxpayer's] assertion that the transaction with '[Mechanical Company]' was for exempt services and did not involve the transfer of tangible personal property."

As in the original May 2017 Letter of Findings, it remains Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong.

Pursuant to IC § 6-2.5-2-1, Indiana's sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC §§ 6-2.5-5 et seq. Taxable retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2-5-4-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2. Therefore, a transaction subject to Indiana's sales/use tax necessarily involves the transfer of "tangible personal property."

45 IAC 2.2-4-2(a) emphasizes that, "Professional services, personal services, and services in respect to property not owned by the person rendering such services are not 'transactions of a retail merchant constituting selling at retail', and are not subject to gross retail tax."

Taxpayer provided documentation in support of its position that a portion of the amount paid Mechanical Company constituted payment for services. To that end, Taxpayer provided Mechanical Company's original written proposal to modify Taxpayer's conveyor system. That proposal defined the materials and services provided Taxpayer. In addition, Taxpayer provided a copy of Mechanical Company's invoice. That invoice distinguished the price paid for labor costs and the price paid for the materials. Of the $34,045 Mechanical Company charged to complete the project, $17,786 was clearly distinguished as labor. Therefore, the $16,259 charge for materials is subject to sales tax and the $17,786 charged for labor is not subject to gross retail tax.

B. Promotional Company Charges.

Taxpayer argues that the approximately $385,000 price it paid to a Promotional Company was not subject to sales tax because the price paid was entirely for services. Publicly available information indicates that Promotional Company "is a world-class producer of corporate meetings . . . ." Taxpayer explains that a copy of the Promotional Company's original invoices is unavailable. However, Taxpayer provided the original "statement of work" ("SOW") entered into between Taxpayer and Promotional Company. Under that SOW, Promotional Company was required to provide "creative materials and audio-visual support" including "video production, on-site show production, [and] on-site photography" for a meeting of Taxpayer's sales personnel. The Promotional Company was also required to "supply all A/V equipment needed at the meeting." In addition, the SOW also required Promotional Company to "develop the theme and other materials" for the sales meeting.

In addition to the parties' SOW, Taxpayer also provided an email response from Promotional Company's representative. That email was in reply to Taxpayer's written question asking for confirmation that "the $385,000 invoice related to services provided and not products or tangible items." Promotional Company's response was that the "$385,000 was all for services."

Taxpayer has met its requirement under IC § 6-8.1-5-1(c) of establishing that the $385,000 purchase was not subject to Indiana's sales or use tax.

C. Marketing Company Charges.

Taxpayer argues that two payments made to Marketing Company were not subject to Indiana's sales or use tax. Taxpayer paid $33,275 and $67,995 to Marketing Company. Publicly available information indicates that Marketing Company advertises itself as "building brand value for manufacturers and retailers . . ." and that it accomplishes this by "manag[ing] a wide variety of media, merchandising, and display platforms."

Taxpayer states that it hired Marketing Company to visit individual chain-store retailers. According to Taxpayer, the sales and marketing personnel visited each retailer in order to assure that sales coupons were displayed on each retailer's shelves and that Taxpayer's new products were properly displayed on those shelves.

The two Marketing Company's invoices are ambiguous; Taxpayer states that it was billed a single price for each visit made by Marketing Company's personnel. Taxpayer provided a copy of an internal email which simply indicates that Marketing Company "went to do re-sets and add new placements of [Taxpayer's] products" and "load[] coupons on the shel[ves]" at each retail location.

In addition, Taxpayer also provided a copy of the original "services agreement" that Taxpayer entered into with Marketing Company. The services agreement required Marketing Company to "exclusively provide in-store merchandising services . . ." at the retailers' locations and recognized that Marketing Company was "in the business of providing in-store merchandising services for the sale of goods and products."

Taxpayer has met its requirement under IC § 6-8.1-5-1(c) of establishing that the $33,275 and $67,995 paid to Marketing Company were not subject to Indiana's sales or use tax.

FINDING

Taxpayer's protest is sustained.

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An html version of this document.